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No. 86-1892

In the Supreme Court of the United States

OCTOBER TERM, 1987

FORD MOTOR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is immune from federal enforcement of an EPA-approved Clean Air Act State Implementation Plan (SIP) on account of a state court's entry of a consent judgment, negotiated between petitioner and state authorities, that purports to vacate the relevant portion of the SIP.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 814 F.2d 1099. The ruling of the district court (Pet. App. 10a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a-19a) was entered on March 27, 1987. The petition for a writ of certiorari was filed on May 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Clean Air Act (CAA), 42 U.S.C. (& Supp. III) 7401 *et seq.*, establishes a comprehensive federal program to protect and enhance the quality of the nation's air resources. Section 109 requires the Environmental Protection Agency (EPA) to promulgate national ambient air quality standards (42 U.S.C. 7409) and Section 110 then requires each state to adopt and submit for EPA approval a State Implementation Plan (SIP) to achieve the federal air quality standards within the state's borders (42 U.S.C. 7410). The SIP will generally contain detailed regulations limiting emissions from air pollution sources, including timetables for compliance. See *ibid.* Once the SIP is approved, both the federal and state governments may enforce its provisions. See CAA § 113, 42 U.S.C. 7413.

1. In February 1979, EPA promulgated a combined primary and secondary national ambient air quality standard for ozone. See 44 Fed. Reg. 8202 (1979); 40 C.F.R. 50.9.[1] Shortly thereafter, Michigan promulgated a SIP, known as Rule 610, governing the release of air pollutants that contribute to ozone formation. Mich. Admin. Code 336.1610 (1979). Among its provisions, Rule 610 limits emissions of volatile organic compounds from vinyl coat-

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[1] Ozone, a by-product of the photo-chemical oxidation of volatile organic compounds (such as solvents), is a respiratory irritant that is linked to various health disorders. 44 Fed. Reg. 8203-8204 (1979). See generally *American Petroleum Institute* v. *Costle*, 665 F.2d 1176 (D.C. Cir.), cert. denied, 455 U.S. 1034 (1981) (upholding EPA's ozone standard).

ing production lines.[2] Rule 610's limitation for each vinyl coating line is directly applicable to petitioner Ford Motor Company's Mount Clemens manufacturing plant, the only vinyl coating facility in the state. This plant is located in a "nonattainment area"—an area in which the ozone level already exceeds the national ambient air quality standard. It is therefore subject to additional Clean Air Act requirements, including a requirement that the plant use, at a minimum, "reasonably available control technology" (RACT) to control its emissions. See CAA § 172(b)(3), 42 U.S.C. 7502(b)(3). Rule 610 was formulated to satisfy that requirement.

Michigan submitted Rule 610 to EPA, and petitioner urged approval, providing technical data in support of its recommendation. See C.A. App. 86-87 (letter from petitioner to EPA). EPA approved Rule 610 on May 6, 1980, specifically noting petitioner's support for the vinyl coating emission limitation. 45 Fed. Reg. 29790, 29799 (1980).[3] Rule 610,

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[2] Rule 610 provides in pertinent part (C.A. App. 74):

> (3) It is unlawful for a person to cause or allow the emission of volatile organic compounds from the coating of * * * vinyl, * * * from any existing coating line, in excess of the equivalent emission rates as shown in table 63.

Table 63 states that the allowable emission rate for the coating of vinyl is 4.5 pounds of volatile organic compounds (minus water) per gallon as applied.

[3] EPA stated (45 Fed. Reg. 29799 (1980)):

> USEPA believes that the technical support submitted by the State and Ford Motor Company adequately documents that an emission limitation of 4.5 lbs/gallon represents

which required compliance by December 31, 1982, thus became part of the federally-enforceable Michigan SIP. See 45 Fed. Reg. 29801-29802 (1980); 40 C.F.R. 52.1172.

On April 19, 1984, EPA determined that petitioner was operating eight vinyl coating lines at the Mount Clemens facility in violation of Rule 610 and issued a Notice of Violation ordering petitioner to comply (C.A. App. 9-10). Petitioner continued to violate Rule 610's requirements. Accordingly, on September 26, 1984, the United States filed this action under Section 113(b) of the Clean Air Act, 42 U.S.C. 7413(b), seeking injunctive relief and civil penalties with respect to the eight lines (C.A. App. 5-19). See 42 U.S.C. 7502(e).[4] The complaint alleged that six of the eight lines were operating without any pollution control equipment and were emitting pollutants at rates in excess of those allowed by Rule 610 (C.A. App. 7, 10-13, 15-17). The complaint further alleged that while petitioner had installed control equipment on the other two lines, emissions from those lines also exceeded the rates prescribed by Rule 610 (*id.* at 13-15).[5]

RACT [reasonably available control technology] for this vinyl coating plant.

EPA also observed that Michigan's Rule 610 is not as stringent as limitations recommended by EPA and placed on vinyl coaters in other states (*ibid.*).

[4] Petitioner contends that EPA did not notify or consult with Michigan before filing the enforcement action (Pet. 7, 20 n.6). In fact, EPA sent a copy of the April 19, 1984 Notice of Violation to the Michigan Department of Natural Resources, pursuant to Section 113(a)(2) of the Clean Air Act, 42 U.S.C. 7413(a)(2). See C.A. App. 10.

[5] Petitioner admits that it has violated Rule 610's emission limitations, but claims that its behavior is consistent with the

2. One month later, petitioner filed suit in Michigan state court against the Michigan Department of Natural Resources, the Michigan Air Pollution Control Commission, and the Michigan Natural Resources Commission. Petitioner sought to enjoin those state defendants from enforcing Rule 610 on the ground, among others, that the emission limits are technologically and economically infeasible. EPA was not a party to the action nor was it notified of the filing of the action.

The Michigan Department of Natural Resources agreed that Rule 610's emission limitations should be revised.[6] In early 1985, the Michigan Air Pollution Control Commission approved a "Stipulation for Entry Consent Order and Final Order" (Pet. App. 26a-31a) stating that "the Commission finds that for [vinyl] coaters 7 and 8 [the lines on which equipment had been installed], the Vinyl Limit [set forth in Rule 610] was (and is) not achievable

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"goal" of those emission limitions. See Pet. 8 (stating that "Ford subsequently met or exceeded the goal for reducing *total* VOC emissions that formed the basis for the *rate* limitation in Rule 610" but was "unable to meet the emissions *rate* limitation of Rule 610" (emphasis in original)); see also *id.* at 7-9, 21 n.7. Indeed, petitioner could hardly contend to be in compliance: it installed no pollution abatement equipment on six of the lines and claims that Rule 610's emission limitations are, in any event, infeasible.

[6] The Department's Air Quality Division prepared a report stating that Rule 610, when enacted, was believed to constitute reasonably available control technology (RACT) (Pet. App. 34a). It also stated, "Because the proposed Order reflects limits that are different than those in the currently approved Michigan SIP, the order must be submitted to EPA as a revision to the SIP. Such 'site-specific' SIP revisions * * * must meet certain criteria in order to be approvable" (*id.* at 36a).

through the use of reasonably available control technology" (*id.* at 27a-28a). The Commission's order provided for a phased shutdown of the six uncontrolled lines and set a more lenient standard for the two controlled lines than that provided in Rule 610. The parties agreed that the order and all necessary data "shall be transmitted to the U.S. Environmental Protection Agency for approval as a revision to the Michigan State Implementation Plan" (Pet. App. 30a). On March 6, 1985, the Michigan Department of Natural Resources submitted the order to EPA for approval as a SIP revision pursuant to Section 110(a)(3) of the Clean Air Act, 42 U.S.C. 7410 (a)(3). See C.A. App. 89.

Petitioner and the state defendants then requested the state court to enter a final judgment and stipulation in accordance with documents submitted by the parties. The state court granted that request on March 18, 1985. See Pet. App. 22a-25a. The judgment, which was drafted by petitioner and the state defendants, states that Rule 610 "is hereby vacated and modified, with regard to the Ford Motor Company Mt. Clemens Vinyl Plant, to define reasonably available control technology, after December 31, 1982, as the emission control program set forth in the 'Stipulation for Entry of Consent Order and Final Order' of the Michigan Air Pollution Control Commission" (*id.* at 23a).

Next, petitioner filed a motion for summary judgment in the instant action, contending that the federal government could not enforce Rule 610 because the state court had invalidated the rule insofar as it applied to petitioner. The district court orally granted the motion on August 5, 1985, and entered

a judgment dismissing the government's claim on August 14, 1985 (Pet. App. 10a, 14a).[7]

3. The court of appeals reversed and remanded the case to the district court to permit the federal enforcement action to proceed (Pet. App. 1a-9a). The court rejected petitioner's contention "that the state court consent judgment is controlling" (*id.* at 3a) and precludes a federal enforcement action. It held that the state court judgment could not preclude federal enforcement of the federally-approved SIP because the Clean Air Act requires that "the original emission limit remains fully enforceable until a revision or variance is approved by both the State and EPA" (*id.* at 7a).

The court distinguished the Seventh Circuit's decision in *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (1983), on which petitioner relied. There, the Seventh Circuit invalidated an Indiana SIP that had not been properly promulgated under state procedural law. The court observed that here, Rule 610 had been properly adopted and only later repudiated by the state "through the discovery of subsequent technical data" (Pet. App. 6a). The court of appeals further stated that petitioner's collateral estoppel claim—based on the Michigan state court's entry of a consent judgment in which the United States was not a party—"borders on the frivolous" (*ibid.*) and that petitioner has no

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[7] The government subsequently filed a motion for reconsideration, which the district court denied (Pet. App. 16a). The district court added that the state court judgment vacated Rule 610 for all lines at the Mount Clemens facility, not just lines 7 and 8, the lines specifically referred to in the state court judgment (*id.* at 17a).

viable claim here that any due process right has been violated (*id.* at 7a-9a).

ARGUMENT

The Michigan Air Pollution Control Commission, with petitioner's support, adopted and submitted for EPA approval SIP regulations limiting pollutant emissions from petitioner's plant. EPA approved those regulations and has since sued petitioner for noncompliance. The state agency, at petitioner's urging, has now concluded that the emission limitations are more demanding than it originally intended. It has elected to revise the limitations and has submitted the revisions for EPA approval. The court of appeals correctly concluded that petitioner remains subject to a federal action for enforcement of the existing regulations unless and until EPA approves the proposed revisions in accordance with statutorily prescribed procedures. That decision does not conflict with any decision of this Court or of any other court of appeals, and does not merit further review.

1. The 1970 amendments to the Clean Air Act "place the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject the States to strict minimum compliance requirements." *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256-257 (1976).[8] "These requirements

[8] See 42 U.S.C. 7410(a)(2), 7502. The 1970 amendments were designed to "tak[e] a stick to the States" and "sharply increased federal authority and responsibility in the continuing effort to combat air pollution." *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 64 (1975). As the court of appeals recognized (Pet. App. 5a), Congress saw a need for minimum federal standards because relaxed requirements in one state could adversely affect air quality in other states.

are of a 'technology-forcing character'" (*id.* at 257 (citation omitted)) and "are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible" (*ibid.*). A state may, of course, impose even stricter limitations than the Act requires (*id.* at 265). But if a state fails to adopt a SIP that meets the Act's minimum requirements, EPA may promulgate its own SIP for that state. CAA § 110(c), 42 U.S.C. 7410(c).[9]

Congress recognized that under this scheme, states might wish to change their SIP requirements in light of changing conditions and enhanced understanding of the complex science and technology of air pollution control. See *Union Electric Co.*, 427 U.S. at 266. Congress therefore provided a SIP revision process, under Section 110(a)(3) of the Act, that allows alteration of previously approved SIP provisions provided that the revised SIP continues to satisfy the Act's minimum requirements (42 U.S.C. 7410(a)(3)). Congress further specified that except for a plan revision under Section 110(a)(3) (and certain other exceptions not relevant here):

> no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator [of EPA].

CAA § 110(i), 42 U.S.C. 7410(i). Thus, Congress stated, in terms that could not be clearer, that a pro-

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[9] Congress, through the 1977 Clean Air Act Amendments, imposed even stricter minimum requirements by placing RACT limitations on non-attainment areas. CAA § 172(b)(3), 42 U.S.C. 7502(b)(3).

posed SIP revision must obtain EPA approval under Section 110(a)(3) to become effective. EPA has consistently emphasized that requirement in the applicable regulations.[10]

This Court has expressly recognized that an EPA-approved SIP remains in effect pending federal approval of a state's proposed revision. See *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 92 (1975). The Court has stated (*ibid.* (footnote omitted)):

> [A] polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the revision authority until they have been approved by both the State and the [Environmental Protection] Agency. Should either entity determine that granting the variance would prevent attainment or maintenance of national air standards, the polluter is presumably within his rights in seeking judicial review. This litigation, however, is carried out on the polluter's time, not the public's, for during its pendency the original regulations remain in effect, and the polluter's failure

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[10] EPA's regulations specifically prohibit the states from unilaterally revising federally-approved SIP provisions:

> The Administrator shall approve any plan, or portion thereof, or any revision of such plan, or portion thereof, if he determines that it meets the requirements of the Act. Revisions of a plan, or any portion thereof, shall not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.

40 C.F.R. 51.8. The SIP revision process also is the proper mechanism by which states may obtain requisite EPA approval for variances applicable to specific polluters. *Train*, 421 U.S. at 70, 86-94.

> to comply may subject him to a variety of enforcement procedures.

The courts of appeals have, in turn, uniformly recognized and applied these principles.[11]

2. Petitioner argues that these principles should not apply here because petitioner negotiated a consent judgment with local authorities stating that Rule 610's emission limitations are "vacated and modified" (Pet. App. 23a). This consent judgment, in petitioner's view, renders Rule 610's emission limitations "invalid as of their inception" (Pet. 15). Petitioner contends that this result must obtain because the local authorities and petitioner "labored from the very outset under a mistake of fact" that the limitations would constitute reasonably available control technology (*id.* at 19-20).

Petitioner's argument is fundamentally inconsistent with the Clean Air Act's language, EPA's regulations, and the numerous judicial decisions cited above. As we have explained, Congress intended that the Clean Air Act would " 'tak[e] a stick to the States' " (*Union Electric Co.*, 427 U.S. at 249 (quoting *Train*, 421 U.S. at 64)) by requiring them to formulate pollution control strategies that "force

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[11] See, *e.g.*, *United States* v. *Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1084-1086 (3d Cir. 1987); *American Cyanamid Co.* v. *EPA*, 810 F.2d 493, 495 (5th Cir. 1987); *Duquesne Light Co.* v. *EPA*, 698 F.2d 456, 470-471 (D.C. Cir. 1983); *Ohio Environmental Council* v. *United States District Court*, 565 F.2d 393, 398 (6th Cir. 1977); *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 511 F.2d 809, 812 (D.C. Cir. 1975); *Natural Resources Defense Council, Inc.* v. *EPA*, 507 F.2d 905, 915 (9th Cir. 1974); *Natural Resources Defense Council, Inc.* v. *EPA*, 478 F.2d 875, 886 (1st Cir. 1973).

regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible" (427 U.S. at 257). Congress fully understood that the resulting SIP requirements would rest on complex scientific and technological projections and might occasionally reflect mistaken assumptions. Congress therefore provided a revision process and further specified that revisions shall not be effective "until they have been approved by *both* the State and the Agency." *Train*, 421 U.S. at 92 (emphasis added). See CAA § 110(a)(3), 42 U.S.C. 7410(a)(3); CAA § 110(i), 42 U.S.C. 7410 (i). Thus the Act, while involving the states in its implementation, carefully preserves a federal role to ensure accomplishment of its purposes notwithstanding any possible inclination of state authorities to give unduly favorable treatment to local industries.

Petitioner, at bottom, argues for a radical amendment of the Clean Air Act that would undermine the basic integrity of the SIP program. The Clean Air Act's elaborate technology forcing provisions and detailed procedures and timetables for SIP submission and approval would lose all practical meaning if a polluter and the state authorities could unilaterally rescind an EPA-approved SIP by simply agreeing that they have made a "mistake of fact" (Pet. 19). Likewise, EPA's authority to review and approve proposed SIP revisions would be eviscerated if any polluter that encountered difficulty in meeting a SIP requirement could invalidate that requirement by simply convincing state authorities that the emission limitation rests upon a "mistaken assumption" (*id.* at 19-20). Indeed, Congres created the SIP revision process for the specific purpose of allowing *both* EPA

and the state authorities to consider technical reassessments of SIP provisions.[12]

Petitioner's argument is not only inconsistent with the Clean Air Act, it is inconsistent with the terms of the agreement that petitioner concluded with the state authorities. Petitioner and the state authorities specifically agreed that the resulting agreement "shall be transmitted to the U.S. Environmental Protection Agency for approval as a revision to the Michigan State Implementation Plan" (Pet. App. 30a). The supporting technical document, prepared by the Michigan Department of Natural Resources, likewise stated that the agreement "must be submitted to EPA as a revision to the SIP" (*id.* at 36a) and that the revision "must meet certain criteria in order to be approvable" (*ibid.*). Thus, petitioner and the state authorities fully understood that their

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[12] Petitioner mistakenly cites *Union Electric Co.* for the proposition that "economic and technological infeasibility is not a proper issue either for EPA or the federal courts" (Pet. 13). Petitioner's characterization of that decision is plainly overbroad. The *Union Electric Co.* decision upheld EPA's position that Congress gave the agency no power to reject a proposed SIP on the ground, proffered by pollution sources, that the state proposal is so strict as to be economically or technologically infeasible (427 U.S. at 256). The decision does not limit EPA's authority to assure that SIP revisions meet the Act's minimum requirements. EPA may examine the technical support for Michigan's newly proposed emission rates—including the evidence supporting Michigan's claim that the present EPA-approved emission rates are infeasible—to assure that the proposed emission limitations meet the Act's RACT requirements. See CAA § 110(a)(2), 42 U.S.C. 7410(a)(2); see also CAA § 172, 42 U.S.C. 7502. Indeed, EPA conducted that type of technical assessment seven years ago when it approved the present RACT-based emission limitations in the original SIP proceedings. See 45 Fed. Reg. 29799 (1980).

agreement constituted a SIP revision subject to the Clean Air Act's revision approval process.

Petitioner suggests (Pet. 16) that this case is distinguishable from a standard SIP revision because petitioner obtained a state court consent judgment that "vacated" Rule 610's emission limitations (Pet. App. 23a). Petitioner itself composed the consent judgment's language and simply submitted it for the court's approval (see *id.* at 22a). Against this background, petitioner's assertion that the state court "[d]etermined" (Pet. 15) or "declared" (*id.* at 17) that Rule 610 was void *ab initio* is especially unpersuasive. There is no reason to believe that the state court intended to prohibit the federal government from enforcing the existing limitations. EPA was not a party to this suit, the state court did not purport to rule that it could issue a judgment binding EPA, and nothing in the judgment or the supporting documents indicates that the parties expected to preclude federal enforcement of Rule 610. Quite to the contrary, the consent judgment was plainly designed to settle a controversy between petitioner and the state authorities (Pet. App. 23a). The judgment simply prohibits the *state* defendants from enforcing Rule 610's emission limitations. See *Local 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, No. 84-1999 (July 2, 1986).

Petitioner's citation of comity principles (Pet. 23-24) is accordingly misplaced. The court of appeals' judgment does not interfere with the state court's limitation on state enforcement of Rule 610.[13] Nor is

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[13] In any event, the Clean Air Act's express provision for a SIP revision process overrides principles of comity. It is, of course, well established that comity gives way where the legislature has indicated to its courts the controlling rule. *E.g.*, *Walworth* v. *Harris*, 129 U.S. 355, 366 (1889). Peti-

petitioner correct in contending that the court of appeals' judgment results in "gross inequities" (*id.* at 24-26, see also *id.* at 16, 21). It is not "Kafkaesque" (*id.* at 16), "outrageous" (*id.* at 21) or a "Catch 22" to require petitioner to comply with existing emission limitations while EPA reviews the proposed revisions. See *Train*, 421 U.S. at 92. That is particularly true here, where *petitioner itself* recommended that EPA approve the existing regulations and provided technical support for that recommendation (see page 3 & note 3, *supra*).[14] Petitioner's contention

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tioner's citation of comity principles is, in fact, rather ironic. Comity is a two-way street; federal and state courts are expected to accord each other *mutual* respect. Comity would therefore caution a state court against entering a judgment precluding federal enforcement of a federal statute in federal court—particularly when the state court action involves only non-federal parties. The state court's judgment in this case should not be extrapolated to reach such an untoward result.

[14] Petitioner's contention that "EPA has simply sat on its hands, acting neither to approve the proposed revision nor to disapprove it" (Pet. 12) is inaccurate. The Clean Air Act charges EPA with responsibility "to protect and enhance the quality of the Nation's air resources" (CAA § 101, 42 U.S.C. 7401), and EPA therefore gives careful scrutiny to any proposal recommending relaxation of existing SIP requirements. And, as petitioner knows, EPA has conducted a continuing dialogue with state authorities and petitioner concerning the technical aspects of the proposal here to ascertain whether it will satisfy the Clean Air Act's minimum requirements. EPA expects to complete its action on a proposal to approve or disapprove Michigan's revision by November 1987, which will then be reviewed by the Office of Management and Budget. Thus, EPA is moving expeditiously in light of the important public rights involved. On the other hand, petitioner's own behavior has not been exemplary. Petitioner operated six of its eight vinyl coating lines, with no

that the court of appeals' decision denies petitioner due process (Pet. 26-28) is likewise meritless. The court of appeals did not "deny[] any meaningful effect to the judgment of the state court" (*id.* at 26); instead, the court of appeals correctly recognized that the state court judgment "has effected the first step in the revision process: the proposal of a revision to EPA by the state" (Pet. App. 8a). Due process does not require a federal court to treat the "first step" of a statutory revision process as a conclusive invalidation of an existing regulation.[15]

In short, Michigan's federally-approved SIP remains in effect—and federally enforceable—unless and until EPA approves the state's proposed revision. The court of appeals correctly rejected petitioner's contrary contentions.

3. In contending (Pet. 16-19) that the court of appeals' decision conflicts with *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (1983), petitioner characterizes *Sierra Club* as broadly holding that an SIP is rendered unenforceable whenever a litigant successfully challenges the SIP in state court. The *Sierra Club* decision is, in fact,

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pollution controls whatsoever, for *two-and one-half years* beyond the legally-binding compliance deadline (Pet. App. 33a).

[15] Petitioner may comment on the EPA's proposed action and may seek judicial review if EPA disapproves the revision. See CAA § 307, 42 U.S.C. 7607. Furthermore, as the court of appeals noted (Pet. App. 9a), petitioner's claims of infeasibility, if substantiated, may be considered as a mitigating factor in the imposition of penalties in the present enforcement action. Petitioner, moreover, has not sought in any court proceeding to require EPA to conclude more promptly its consideration of the proposed revision.

much narrower. The court of appeals correctly found that decision to be "readily distinguishable" (Pet. App. 6a n.1) from the case here.

In *Sierra Club*, a private organization brought suit in federal court to enforce an EPA-approved provision of the Indiana SIP. The federal court recognized that, prior to the citizen suit, an Indiana court had determined that the Indiana air pollution authorities had failed to comply with state procedural law when promulgating the SIP. 716 F.2d at 1147. The court held that the SIP was therefore unenforceable, reasoning that EPA approval of the SIP could not cure the procedural defect (716 F.2d at 1148).

As the court of appeals recognized (Pet. App. 6a), the *Sierra Club* decision is plainly limited to its special facts. The decision repeatedly emphasizes that the Indiana SIP was unenforceable because it was *procedurally* defective.[16] Indeed, the Seventh Circuit stated:

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[16] Petitioner specifically relies on a single sentence in *Sierra Club* for the proposition that the decision bars enforcement of the SIP in the event of *any* successful state court challenge (Pet. 6). The full passage in which that sentence is used shows, however, that the court was addressing only procedural challenges:

> Our examination of the statute, relevant judicial precedent, and the legislative history reveals that the Act does permit a successful state court challenge to render an implementation plan provision unenforceable in both federal and state court.
>
> Three reasons support this conclusion. *First*, administrative action, to be valid, must substantially comply with applicable procedural rules. Because APC-13 was not promulgated in accordance with Indiana procedural law, APC-13 is invalid and may not be enforced. *Second*, decisions construing the Act have encouraged litigants to

> Once a plan is adopted by the states and it *withstands any subsequent procedural challenge*, then § 7607(b)(1) provides that invalidation may occur only in the federal appellate courts.

716 F.2d at 1152 (emphasis in original). Thus, the *Sierra Club* decision, by its own terms, does not conflict with the court of appeals' decision in the present case.[17]

Petitioner concedes that the state court here did not find Rule 610 procedurally defective; instead, petitioner characterizes the state court judgment as confirming that Rule 610 possessed a "fundamental *substantive* defect under state law" (Pet. 17 (emphasis in original)). But even that characterization is overstated. As we have explained, the state court judgment simply ratified an agreement between petitioner and the state authorities providing that an

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> pursue their procedural challenges to state implementation plans in the state courts. For that review to be meaningful, a state court ruling, like that of the Indiana Appellate Court, must be given effect. *Finally*, no precedent exists to support the Sierra Club's novel suggestion that an invalid plan should be given effect until a replacement is devised; instead the Act and its Legislative history foresaw EPA action as the appropriate remedy for any state level failure.

716 F.2d at 1148 (emphasis in original).

[17] Petitioner's citations to *New Mexico Environmental Improvement Division* v. *Thomas*, 789 F.2d 825 (10th Cir. 1986), and *Illinois* v. *Celotex Corp.*, 516 F. Supp. 716 (C.D. Ill. 1981), are also misplaced. In the former case, the Tenth Circuit held that EPA could impose sanctions upon a state for failure to submit a SIP that complied with state law. In the latter case, the district court, as in *Sierra Club*, invalidated a SIP that was improperly promulgated under state procedural law.

EPA-approved emission limitation, validly promulgated under Michigan law, should be revised and submitted to EPA for approval. Petitioner points to nothing in Michigan substantive law that forbade the state pollution control authorities from imposing the original emission limitations prescribed by Rule 610. Nor did the state court find that action to have been ultra vires.

At bottom, petitioner can assert only that the state authorities, in attempting to satisfy the Clean Air Act's minimum requirements, actually imposed somewhat stricter standards.[18] EPA may or may not agree with that conclusion, depending on the results of its own ongoing technical assessment. But whatever the outcome of that assessment, there is certainly no merit to petitioner's statement that a "SIP provision promulgated in the mistaken assumption that it represented RACT means that there never was a federally-enforceable SIP provision applicable to Ford's Mount Clemens plant" (Pet. 19-20). Michigan's EPA-approved SIP remains in effect until changed in accordance with the Clean Air Act's SIP revision process. Petitioner simply seeks license to circumnavigate the statutory scheme.

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[18] Petitioner concedes that Rule 610, when promulgated by the state at petitioner's urging, "was believed to be economically and technically feasible based upon the data then available" (Pet. 9) and that the state authorities reached a different conclusion only "[u]pon reevaluation" (*ibid.*) by the state authorities following Ford's state court suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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